IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 103

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILWAY COMPANY; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel,
Room 511—City Hall,
Chicago 2, Illinois,
Attorneys for Petitioner.

INDEX.

Subject Matter.

Cases Cited.

Cases Distinguished.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 103.

CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Petitioner,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE BALTIMORE AND OHIO RAILWAY COMPANY; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

STATEMENT.

Certiorari was granted in this case because the commerce clause of the U. S. Constitution, Article I, Sec. 8, cl. 3, became the decisive issue for the first time in the Court of Appeals to determine that Transfer's operation of motor vehicles in the city of Chicago for transportation of passengers between railroad terminals on through route railroad tickets in intrastate and interstate commerce were not subject to license and regulation under a city ordinance, which the District Court held to be applicable to Transfer's vehicles. The question of the applicability of the Ordinance to Transfer's operations was brought in issue by respondents in the District Court and was at issue in the Court of Appeals. The propriety of the Court of Appeals in undertaking to decide the case on constitutional grounds when there was a question of the proper construction of the city ordinance under state law is the sole issue in this case.

ARGUMENT.

I.

The Question of the Applicability of the Ordinance.

Petitioner agrees that this question is not before this Court for adjudication. But neither is the question of the constitutionality of Section 28-31.1 of the Ordinance before this Court. The only question now is whether the Court of Appeals should have considered the constitutional question before respondents had exhausted their state administrative and judicial remedies by applying for a license and, if arbitrarily refused, securing an authoritative decision of the State courts as to the applicability of the Ordinance to Transfer's operations.

Petitioner has not changed its position in the course of the litigation in the lower courts. The issues remain the same upon the face of the record, as they were by the pleadings in the District Court. Respondents were the first to contend that the Ordinance has no application to Transfer's passenger motor vehicles by refusing to apply for licenses under the Ordinance and by basing its complaint on that ground (R. 11, 22). Parmelee intervened as party defendant praying that the court enter judgment declaring that Transfer's operations constitute the operation of public passenger terminal vehicles within the purview of the Ordinance and that it is required to secure licenses for its operations and to comply with all reasonable police power requirements imposed by the city ordinances upon public passenger vehicles and public passenger vehicle operators (R. 61). The city filed a motion for summary declaratory judgment upon that record, submitting seven special interrogatories deemed material for deter-

mining the question of the applicability of the Ordinance to Transfer's operations as a matter of law (R. 71, 72).

It is true that the city submitted to the jurisdiction of the District Court the question of the applicability of the Ordinance to Transfer, but there is nothing in the record of this case to indicate that the city considered the presence of any constitutional question or that the validity or construction of Section 28-31.1 of the Ordinance was necessarily involved in determining whether the regulation of Transfer's operations by license and enforcement of the police ordinances governing such operations are applicable to Transfer. None of the special interrogatories submitted by the city makes mention of Section 28-31.1. The ultimate issue can be decided by proper construction of section 28-1 defining "Public passenger vehicle" and "Terminal vehicle," as amended by the 1955 ordinance, or by Section 28-2, making it unlawful to operate any vehicle for transportation of passengers for hire from place to place within the corporate limits of the city unless it is licensed as a public passenger vehicle.

The validity of Section 28-31.1, on constitutional grounds, became the crucial issue in the opinion of the Court of Appeals because that court failed to consider the question of the applicability of the Ordinance to Transfer's operations, from the language thereof. Instead, the Court directed its inquiry to the motives or interest of the authors in adding Section 28-31.1 to the Ordinance by the 1955 amendment which the court considered "significant", although it was conceded by Parmelee and the city in argument that a license to carry on interstate transfer operations cannot be withheld on economic grounds of public convenience and necessity (Appellees' Brief in Court of Appeals pp. 36, 37).

The Court of Appeals did not hold Chapter 28 applicable to respondents, as asserted in their brief, pp. 9, 14 (R.

208-209; 200). It not only held Section 28-31.1 of the Ordinance invalid, but held the entire 1955 ordinance invalid (R. 208). It thereby struck down the new definition in section 28-1 of "Terminal vehicle," as a public passenger vehicle, without any contractual right or obligation to transfer railroad or steamship passengers *en route* in interstate travel between terminals. It also nullified section 28-31, as amended by the 1955 ordinance, to remove the necessity of a contract with one or more railroad or steamship companies to qualify any person for a terminal vehicle (R. 188). Finally, it denied the city the right to regulate the rate of fare for local transportation of passengers in terminal vehicles, granted by the city's charter. (Section 23-51, Chapter 24 Cities and Villages Act, Ill. Rev. St. 1955, Appendix A, Petition for Writ of Certiorari).

Respondents, not the city, have changed their position in this case as to the applicability of the Ordinance to Transfer's operations. In the concluding page of their reply brief in the District Court, certified to this Court as part of the unprinted record in the Court of Appeals, all counsel for repondents joined in the following statement, appearing in the Appendix to this brief:

> "The defendants have filed a motion for summary judgment which in effect asks certain questions. The plaintiffs' foregoing argument deals fully with the subject matter of all such questions. It is submitted that the questions should receive the following answers:
>
> Questions 2 and 3: Yes.
>
> All other questions: No."

Question 2 was whether Transfer by virtue of its contract with the plaintiff railroad companies is operating its vehicles within the city of Chicago exclusively as agent for and in behalf of plaintiff railroads as public utilities under the laws of Illinois. Question 3 was whether Transfer's operations are confined to the transportation of passengers on through route railroad and steamship tickets

between points outside of the corporate limits of the city in intrastate and interstate commerce.

The answers to all other questions in the motion of defendants, City of Chicago, its Mayor, Corporation Counsel, Commissioner of Police and Public Vehicle License Commissioner were that Transfer is not a public utility under the laws of Illinois; that it does not operate any vehicles for transportation of passengers for hire from place to place within the corporate limits of the city as provided in Section 23-22 of the Municipal Code of Chicago; that it does not operate terminal vehicles as defined in Section 28-1 of said code, as amended July 26, 1955; that its operations are not in local transportation of passengers at rates of fare subject to Section 28-31.2 of said code, as amended July 26, 1955; and that its operations are not subject to the provisions of Chapter 28 of said Code (R. 71-72).

The Illinois cases cited on page 15 of respondents' brief in support of their argument that the city cannot now take the position that the courts below erred in agreeing with the city as to the applicability of the Ordinance are not pertinent to the facts in this case. The city filed no answer to the complaint or otherwise pleaded in the courts below that section 28-31.1 is applicable to Transfer's operations. In any event, the policy of the Federal Courts in withholding the exercise of jurisdiction to permit the exhaustion of state administrative and judicial remedies as may be available to determine rights under state laws, and particularly the policy of this Court in avoiding or postponing consideration of constitutional questions in advance of necessity, is not governed by consent or passive submission of the litigating parties. (See citations in Petitioner's Brief on Writ of Certiorari p. 18.)

N. Y. Elevated Railroad v. *Fifth Nat. Bk.*, 135 U. S. 432, cited in respondents' brief, p. 15, involved an action for

damages for construction of a track and station house in front of the banking-house. It appears that the law of New York was that the owner of lands abutting on a city street having an easement of way and of light and air over it and may recover of the elevated railroad company full compensation for permanent injury to this easement. This law was followed in the case.

The general rule of estoppel applied in the case of *Callanan Road Co.* v. *United States*, 345 U. S. 507, cited in respondents' brief, p. 15, although inapplicable to the position of the city in this case, does not bar this Court from following its established policy in avoiding or postponing consideration of constitutional questions in advance of necessity.

2.

Occasion for Remission of Issue to Illinois Courts.

Respondents have argued that the city has made no attempt to point to any ambiguity in Chapter 28; that the Ordinance is so clear that no occasion exists for remission of issues to the Illinois courts. In support of this argument, they assert that the city obtained judgments which it requested in the courts below holding that Chapter 28 is applicable to respondents' interstation transfer service, and that the city cannot now for the first time contend that the cause should be remitted to Illinois courts for construction of the Ordinance.

Respondents believed and strenuously argued that the Ordinance was not applicable to Transfer's operation. Parmelee was emphatic in its claim not only that Transfer's operations were clearly those of a public passenger vehicle, within the definition of Section 28-1, but also that its vehicles are "terminal vehicles," as defined in said section.

To resolve the issue between respondents and Parmelee, a suit was instituted in the District Court. (Excerpts from Appendix B, p. 25a to Transfer's brief in Court of Appeals; Petitioner's brief on writ of certiorari, p. 27.) The District Court held that Transfer owns and operates public passenger vehicles of the terminal vehicle category, as defined in Section 28-1 of the Ordinance; that it operates said motor vehicles on the public ways of the city for the transportation of passengers for hire from place to place within the corporate limits of the city, as provided in Section 28-2 of the Ordinance; that the Ordinance is a proper exercise of police power by the city in the interest of the safety, health and welfare of the public; that the federal government has not undertaken to regulate the subjects over which the city has thus exercised its police power; and that the Ordinance does not grant the city authorities an arbitrary right to refuse a terminal vehicle license (R. 158).

The Court of Appeals, without considering the present definition of "terminal vehicle," which has no relation by contract, or otherwise, to respondent railroads, held that section 28-31.1, limiting the number of terminal vehicles to public convenience and necessity require, in effect named Parmelee as the exclusive operator of motor vehicle service for the transfer of passengers between railroad terminals on through tickets calling for interstate transportation in Chicago (R. 206). The Court concluded that there is no valid legal basis for section 28-31.1 of the 1955 ordinance, and held the 1955 ordinance invalid as an interference with interstate commerce (R. 208). In support of its conclusion it cited the so-called legislative history of the Ordinance, to which reference has been made in the first point of our main brief, and which was more fully set forth in respondents' own argument in the District Court, excerpts from which appear in the appendix to this brief.

The city has contended, "The Ordinance does not purport, and cannot be construed, to preclude any railroad and steamship company from providing motor vehicles for the transfer of its passengers between terminal stations in the city upon through route tickets, subject to local regulation as may be lawfully imposed without conflict with federal authority". (Exerpts from Petition for Rehearing in Court of Appeals; Petitioner's brief on writ of certiorari, p. 26). In the light of these conflicts of interpretation of the Ordinance by respondents, the city, Parmelee, the District Court and the Court of Appeals, the statement of respondents that the Ordinance is clear, and that petitioner fails to point to any error in its construction in the courts below, lacks sincerity. Do respondents now claim that Chapter 28 is clearly applicable to their interstation transfer service, although they contended strenuously, both in the District Court and the Court of Appeals, that it is inapplicable to such service?

Neither *Toomer* v. *Witsell*, 334 U. S. 385, nor *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, cited in respondents' brief, pp. 16, 17, involved a constitutional question which depended on the interpretation of a state law or ordinance.

Morley v. *Doud*, 354 U. S. 457, cited by respondents under this point, concerned the validity of the Illinois Community Currency Exchange Act, excepting money orders of the American Express Company from the requirement that any firm selling or issuing money orders in the State must secure a license and submit to State regulation. The objection was that the exception is discriminatory in violation of the Fourteenth Amendment. There was no issue as to the construction of the Illinois Act. The State urged that if the exception is unconstitutional, the case should be remanded to the Illinois courts for a determination whether

the exception can be severed from the Act to sustain its constitutionality. This Court answered that in another case, the Supreme Court of Illinois clearly held that the exception is not severable.

We insist that Section 28-31.1, relating to public convenience and necessity, is applicable only to Parmelee's local transportation operations and to such other operations as may be licensed, subject to public convenience and necessity. It applies specifically to "terminal vehicles," as defined in Section 28-1 of the 1955 ordinance, and not to other "public passenger vehicles," as defined in said section. It seems to us that the Court of Appeals determined that Transfer's operations are public passenger vehicles, subject to license and regulation by the city, but that the city cannot rely on economic considerations in determining whether to issue public passenger vehicle licenses to applicants engaged in the transfer of passengers in interstate commerce between railroad terminals in Chicago (R. 209). If the city's interpretation of the Ordinance were adopted, that Section 28-31.1 applies only to terminal vehicles, as carriers of passengers from railroad and steamship terminals to destinations within the limited area defined in Section 28-31, for cash fares, instead of on a through railroad or steamship ticket, such operation would be strictly a local transportation service subject to the provisions of Section 28-31.1, and the commerce clause of the U. S. Constitution would not be involved.

The statement of counsel for respondents that remission to the state courts in a controversy involving the construction of a city ordinance or the application of state law is not ordered unless demand for remission was made at the outset of the litigation, is not warranted by any decision of this Court. The rule has been adopted by this Court "for its own governance in cases confessedly within its

jurisdiction." *Rescue Army* v. *Municipal Court*, 331 U. S. 549.

In *Fielderest*, 316 U. S. 168, 172, this Court said: "the determination which the District Court, the Circuit Court of Appeals or we might make could not be anything more than a forecast—a prediction as to the ultimate decision of the Supreme Court of Illinois."

The decision of the Federal Courts as to the applicability of the Ordinance would not be binding on the State courts in the construction of the Ordinance. *Fielderest*, *supra*. Certainly the question whether the Supreme Court of Illinois will abide by the decision in this case is premature. The final decision of this Court will govern in a plea of *res judicata*.

3.

Resort to Legislative History.

We believe we have fully discussed this subject in Argument I of our main brief. Respondents have not distinguished the Illinois cases which we cited, as bearing directly on the facts in this case.

The cases cited by respondents are not applicable to gratuitous statements made by members of a committee of the city council or by the opinions of an attorney on the subject. Respondents have not shown that any statement contained in the so-called minutes of the local transportation committee was reported to the city council for consideration of the 1955 ordinance (R. 44). The statements of members of the committee or of the authors of an ordinance are not part of the legislative history in the city council, as journals of proceedings required by law or authority of the legislative body to be recorded and published.

Respondents' arguments, included in the appendix to this brief, prove that they did not consider the "minutes" as a reliable report of the statements made by counsel for the city at the meeting of July 21, 1955 (R. 91, 92).

4.

Validity of Section 28-31.1 Under the Commerce Clause.

We deem it unnecessary to reply to this point because, as we have abundantly demonstrated, in our main brief and in this reply, that the constitutional question presented should not be decided until an authoritative decision of Illinois courts is made as to the applicability of this section to the interstation transfer service, in the light of the constitutional objection herein presented.

Respectfully submitted,

JOHN C. MELANIPHY,
Corporation Counsel of the City of Chicago,
JOSEPH F. GROSSMAN,
Special Assistant Corporation Counsel,
Room 511, City Hall,
Chicago 2, Illinois,
Attorneys for Petitioner.

(p 12 is blank)

APPENDIX.

Excerpts from Plaintiffs' Reply Brief in the District Court not in the printed record and certified to this Court by the Clerk of the Court of Appeals.

Page 5. * * *

The Court's attention is directed to Plaintiffs' Exhibits 3, 4, 5 and 7. The City Clerk's certified copy of the Minutes of the July 21, 1955, Meeting of the Transportation Committee (Pl. Ex. 5) represents some unknown person's version of what was supposed to have taken place at that meeting with regard to the Abandoned Amendment and the July 26, 1955 Amendment. This version omits the decisive facts on the intended purpose and the intended scope of the July 26, 1955 Amendment which have a decisive influencing significance on the issue of the nonapplicability of that Amendment to plaintiffs' operations presented by the Complaint, as set forth below in Section B.

Pages 8-11. * * *

6. The July 26, 1955 Amendment was drafted by the Special Assistant Corporation Counsel who appeared for the City in these proceedings to carry out the intention of the Transportation Committee to preserve for Parmelee's terminal vehicles, otherwise disqualified for lack of qualifying factors, limited loop area passenger transportation business as a separate category of public passenger vehicles for hire, with distinctive features not then prevailing in the case of the other categories of public passenger vehicles for hire licensed and regulated by the Ordinance. The terminal vehicles operating under the Ordinance, as amended by the July 26, 1955 Amendment, with such distinctive features were characterized by Parmelee itself as "terminal vehicles which are special forms of taxis or hacks operating commercially over city streets" (Intervenor's Memorandum in Opposition to

Motion for Temporary Injunction (hereinafter referred to as Parmelee's Memorandum), p. 6).

The July 21, 1955 Transportation Committee Meeting proceedings are set forth in Pl. Ex. 4 filed on November 21, 1955, from which the following quotations are pertinent at this point:

> Mr. Grossman: The ordinance that was presented to me for consideration yesterday, or the day before yesterday, I examined very carefully, and I don't think that it is within the corporate power of the City of Chicago, but the objective can be obtained in some other way, I think, without conflicting with our charter powers, and I had a conference with some of the members this afternoon, and proposed an approach which I think we can work out between now and the next meeting of the City Council.
>
> Chairman Sheridan: Is there anybody who wants to comment on this or add anything to the discussion?
>
> Alderman Holman: One question. Do I understand that terminal vehicles embrace those vehicles that operate between railroad stations?
>
> Chairman Sheridan: Yes.
>
> Alderman Holman: Is it limited to that?
>
> Mr. Grossman: No, it is not. The operation from the railroad stations to points within the central business district, which is defined as the area bounded on the North by Ohio Street and on the South by Roosevelt Road, and the Lake on the East and Canal Street on the West. It is in the railroad terminal area, but it isn't necessarily between railroad stations. It may go from railroad stations to hotels and from hotels to railroad stations. That is the operation.
>
> Alderman Holman: Thank you.
>
> Mr. Grossman: And that operation can be continued by amendments to the present ordinance without conflicting with any of the statutory provisions.

Chairman Sheridan: Will you be kind enough to get that prepared for us?

Mr. Grossman: Yes.

Alderman Johnson: May I ask a question.

Chairman Sheridan: Yes.

Alderman Johnson: These vehicles carry passengers or baggage?

Mr. Grossman: This is public passenger vehicles.

Alderman Johnson: The old system where you get off the train and go to the hotel?

Mr. Grossman: Yes.

Alderman Burke: Is this a service that has been available to the travellers for some 60, 70 or 80 years?

Chairman Sheridan: It is my understanding they have been in existence in the City of Chicago for 103 years.

Pages 14-15. * * *

8. There is nothing in the record to justify a construction of the Ordinance, as Parmelee contends, to make terminal vehicle operation applicable to Transfer's operations. Such a conclusion could be justified only if it is presumed that the City authorities who drafted and passed the July 26, 1955 Amendment deliberately disregarded the relation of such service to the through railroad transportation service of which it is an integral part and as to which the Courts in the above cited cases have taken judicial notice as being matters of common knowledge.

The requirements of current railroad operation in through passenger transportation using Chicago as a junction point are set forth in Exhibit A attached to the Motion for Temporary Restraining Order, and the requirements for high-grade, safe and satisfactory Coupon holder interstation transfer service within the limited time available therefor are set forth in the Agency Contract, Exhibit A attached to the Complaint. In the face of such evidence, any construction of the Ordinance by Parmelee in behalf of its own interests

namely, that the Ordinance, including the July 26, 1955 Amendment, has application to Transfer's operations—is utterly unwarranted.

Page 54.

V.

Answers to the Motion of Defendants for Summary Judgment.

The defendants have filed a motion for summary judgment which in effect asks certain questions. The plaintiffs' foregoing argument deals fully with the subject matter of all such questions. It is submitted that the questions should receive the following answers:

Questions 2 and 3: Yes.
All other questions: No.

Conclusion.

The foregoing shows clearly that plaintiffs are entitled to a preliminary injunction restraining the defendants as now provided in the temporary restraining order.

Respectfully submitted,

BENJAMIN F. GOLDSTEIN,
AMOS M. MATHEWS,
Attorneys for Plaintiff Terminal Lines.

BENJAMIN F. GOLDSTEIN,
ALBERT J. MESEROW,
Attorneys for Plaintiff Railroad Transfer Service, Inc.